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NOTES.

CONSTITUTIONALITY OF RACE SEGREGATION.—While the due process and equal protection clauses of the Fourteenth Amendment make no mention of race, color or previous condition of servitude, it is familiar history that the animating purpose of the Amendment was the protection of the negro against unwarranted restraints and discriminations imposed by the states.[1] It may be said with confidence, there-

[1]See Mr. Justice Miller in Slaughter-House Cases (1873) 83 U. S. 36, 71-72, and Mr. Justice Strong in Strauder *v.* West Virginia (1879) 100 U. S. 303, 306-308.

fore, that a restriction of the area in which negroes may have their homes is obnoxious to that vaporous, but none the less vital, essence known as the "spirit" of the Fourteenth Amendment. It is undeniable also that such a restriction is within the strict letter of the constitutional prohibition. For if, in a designated area, a white man may purchase a home to live in, and a negro may not, the negro is discriminated against and is thus denied the equality of legal treatment which the equal protection clause by its terms implies. This discrimination against the negro does not evaporate because, in some other designated area, a negro may buy a home to live in, and a white man may not. In this area the white man is discriminated against in favor of the negro. Such discrimination also comes within the letter of the constitutional prohibition. In addition to these localized discriminations against blacks and whites respectively, a segregation law imposes against all owners of residence property certain restraints on alienation. In some areas owners may sell only for white occupancy; in others, only for black. This denial of freedom to contract is a taking of liberty and also of property.[2] Unless therefore, such restriction can be justified as a proper exercise of the police power, it is a taking without due process of law.

The proponents of the constitutionality of segregation laws take two positions: first, that they involve no discrimination;[3] and secondly, that the discrimination which they involve is justified by the police power.[4] The first point finds some apparent support in the opinion of Mr. Justice Brown in *Plessy* v. *Ferguson*[5] which sustained a state statute compelling railroads to provide "separate but equal" accommodations for the white and colored races. But the support is only apparent. The learned justice took the position that if "the enforced separation of the two races stamps the colored race with a badge of inferiority", this "is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."[6] However correct it may be to blame the negro's defective perceptions for any seeming invidiousness in the operation of a segregation law, the fact that the law is not invidious does not mean that it is not discriminatory. In order to establish discrimination, it is only necessary to show that one class has not the same legal freedom accorded to another. A pinch of common sense is enough to make clear that a segregation ordinance treats one class differently than another. The place where the discrimination impinges may be limited in area. There may be other places where a reverse form of discrimination is imposed. But the cross discriminations in different places do not obliterate the fact of discrimination in both.

It does not follow, however, that because there is discrimination, there is a denial of equal protection of the laws, as that phrase has been interpreted by the Supreme Court. The Court permits difference of treatment provided all in a class are treated alike and provided also the classification is on a reasonable basis.[7] The crucial question,

[2]Allgeyer *v.* Louisiana (1897) 165 U. S. 578, 591-592, 17 Sup. Ct. 427; Holden *v.* Hardy (1898) 169 U. S. 366, 391, 18 Sup. Ct. 383.

[3]16 Michigan Law Rev. 109, 110; 27 Yale Law Journal 393, 394.

[4]16 Michigan Law Rev. 109, 111; 27 Yale Law Journal 393, 397.

[5](1896) 163 U. S. 537, 16 Sup. Ct. 1138.

[6]At p. 551.

[7]Missouri *v.* Lewis (1879) 101 U. S. 22; Barbier *v.* Connolly (1885) 113 U. S. 27, 5 Sup. Ct. 357.

therefore, in determining the constitutionality of residential race segregation is whether the color line furnishes a reasonable basis of classification. The same consideration determines whether it is a proper exercise of the police power, and therefore due process of law, to restrain owners of land from alienating their parcels for white or colored occupancy depending respectively on the dominant population of the block in which the parcel lies. If it is reasonable to compel the races to dwell permanently apart, it is reasonable to restrict the power of alienation to effectuate this result. Thus both the due process and the equal protection issues depend for their solution on this same question of reasonableness.

It is to be noted, however, that, in settling the due-process dispute, the fact of race discrimination assumes importance, not as an objection to an otherwise valid statute, but as an alleged justification for a statute otherwise invalid. The friends of the restraint on alienation must establish that the discrimination between the races is a positive good and not merely an insignificant evil. For, unless the statute will keep negroes from moving to the blocks where their neighbors will be preponderantly white, and unless this is a public benefit, the justification for the otherwise invalid restriction fails. Statutes making arrangements for the conduct of the public schools,[8] or regulating the operations of public carriers,[9] or amending the charters of corporations[10] have no such initial invalidity to overcome as has a statute limiting the freedom of an owner to sell his land.

Supporters of the constitutionality of segregation laws have cited with seeming confidence the oft repeated *formulae* with respect to the criteria of reasonableness, to the weight to be given to legislative determinations of the issue, and to the duty of the courts not to declare a statute unconstitutional unless its unconstitutionality is free from doubt.[11] In spite of these rubrical guides, statutes are frequently declared unconstitutional, and by a bare majority of the court. These canons of judicial review are honored so frequently in the breach as well as in the observance, that they aid but little in the judicial settlement of constitutional issues. Moreover, in view of the background and underlying purpose of the Civil War Amendments, the legislative determination that there shall be discrimination on the basis of color is entitled to little more than a minimum of respect by the Supreme Court.[12] The ascription of any considerable weight to such legislative judgment would furnish a useful premise from which to deduce sanction for a new nullification of the Constitution.

The problem of reasonableness must be approached concretely and realistically. A basis of classification may be reasonable for one purpose and unreasonable for another.[13] For this reason the decisions sustaining the propriety of classification on the basis of race for the

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[8]People *v.* Gallagher (1883) 93 N. Y. 438.

[9]Plessy *v.* Ferguson, *supra,* footnote 5.

[10]Berea College *v.* Kentucky (1908) 211 U. S. 45, 29 Sup. Ct. 33.

[11]16 Michigan Law Rev. 109, 111; 31 Harvard Law Rev. 475-479.

[12]The same is true of the respect to be paid to the determinations of the courts of southern states sustaining such discrimination.

[13]See Mr. Justice McKenna in Billings *v.* Illinois (1903) 188 U. S. 97, 102-103, 23 Sup. Ct. 272. Compare American Sugar Refining Co. *v.* Louisiana (1900) 179 U. S. 89, 21 Sup. Ct. 43, with McFarland *v.* American Sugar Refining Co. (1916) 241 U. S. 79, 36 Sup. Ct. 498.

imposition of some discriminatory restrictions are not controlling on the question of the propriety of the same basis for other restrictions. It may be reasonable, as it has been held to be, to forbid intermarriage of Caucasians and Africans,[14] to provide severer penalties for bichromatic intimacies out of wedlock than for monochromatic intimacies,[15] to separate the races in schools[16] and public conveyances,[17] and yet be unreasonable to forbid them to live in the same neighborhood. The validity of each discrimination depends upon its particular justifications. The same is true of the validity of a restraint on the alienation of property. It may be proper to forbid the use of property for a saloon [18] or a brickyard,[19] but improper to forbid its use as a dwelling place for a negro or for a white man. And the justification for each restriction or discrimination must be determined by a judgment as to the relation between the burden imposed on individuals and the benefits to the public resulting therefrom.[20] The extent of the burden is dependent not only on the material inconveniences which it occasions, but on the legal quality of the interest which it thwarts.[21]

Weighed in such scales, the interest of going to a particular public school or of riding in a particular conveyance is materially and legally less deserving of consideration than is the interest of choosing one's place of abode. Public schools and public conveyances are subject to greater governmental supervision and regulation than is the selection of a home. The establishment of a pale beyond which one must not live, except by migration from the governmental district, is a more serious and more permanent interference with liberty and property than those which result from exclusion from certain schools or certain railway carriages. The hypothesis that other schools and other cars are equal to those forbidden is closer to fact than is any hypothesis that the area reserved for negro dwellings is equal to that designated for the whites. If substantial equality of school and transportation accommodations is denied, there is legal power to compel it or to disregard the prohibition against entering the forbidden spot.[22] On the other hand, if exclusion of blacks from white areas is sustained as constitutional, no *mandamus* can alter the character of the neigh-

[14]State *v.* Gibson (1871) 36 Ind. 389.

[15]Pace *v.* Alabama (1882) 106 U. S. 583, 1 Sup. Ct. 637.

[16]Lehew *v.* Brummell (1891) 103 Mo. 546, 15 S. W. 765, and other cases cited in Plessy *v.* Ferguson, *supra,* footnote 5.

[17]Plessy *v.* Ferguson, *supra,* footnote 5.

[18]State *v.* Ball (1909) 19 N. D. 782, 123 N. W. 826, cited in 27 Yale Law Journal 395, *n.* 15, in the course of a discussion advocating the constitutionality of laws separating the races in residence areas.

[19]Hadacheck *v.* Los Angeles (1915) 239 U. S. 394, 36 Sup. Ct. 143.

[20]See Lawton *v.* Steele (1894) 152 U. S. 133, at p. 140, 14 Sup. Ct. 499; Noble State Bank *v.* Haskell (1911) 219 U. S. 104, at p. 110, 31 Sup. Ct. 186; Eubank *v.* City of Richmond (1912) 226 U. S. 137, at pp. 143-144, 33 Sup. Ct. 76; Rideout *v.* Knox (1889) 148 Mass. 368, at pp. 372-373, 19 N. E. 390; Commonwealth *v.* Strauss (1906) 191 Mass. 545, at p. 553, 78 N. E. 136; and Mr. Justice McKenna's dissenting opinion in Adair *v.* United States (1908) 208 U. S. 161, at p. 189, 28 Sup. Ct. 277.

[21]See 17 Columbia Law Rev. 114, 119-120, *n.* 6. See also Crowley *v.* Christensen (1890) 137 U. S. 86, 11 Sup. Ct. 13; Public Clearing House *v.* Coyne (1904) 194 U. S. 497, 24 Sup. Ct. 789.

[22]McCabe *v.* Atchison, T. & S. F. Ry. (1914) 235 U. S. 151, 35 Sup. Ct. 69.

borhood remaining for occupancy by the blacks. Housing accommodations are not, like schools and transportation, provided by municipal or public-service corporations. In plain fact, a negro who is eager and financially able to live in a white neighborhood, but is forbidden by law to do so, is denied the possibility of obtaining accommodations equal to those available to the white man. Since the protection accorded by the Fourteenth Amendment is personal,[23] the constitutional rights of the individual negro are unaffected by the fact that the undesirability of negro neighborhoods is attributable to the shiftlessness and uncleanliness of the fellow-members of his race. In any candid view of the actual situation, the exclusion of negroes from all blocks in which whites predominate is a more grevious infringement of the requirement of equality than is the failure to provide parlor and dining cars for negroes and the exclusion of negroes from those open to whites. And such discrimination in respect to the luxuries of railway travel is declared to be inconsistent with the requirements of the Constitution.[24]

These considerations differentiate the constitutional issue raised by an ordinance discriminating between the races in respect to freedom to choose their abode, from the issue in the decisions in which race discrimination has been sustained.[25] And in *Buchanan* v. *Warley* (1917) 38 Sup. Ct. 16,[26] the Supreme Court found the considerations sufficient to distinguish the precedents and to require it to declare invalid a municipal ordinance forbidding the sale of property for residence purposes where the intending dweller was of a different race from that of the majority in the block in which the parcel lies.[27]

Though the opinion has the aroma of race discrimination and the equal protection clause, it treats the issue as one concerned primarily with the due process clause and the rights of owners of real estate. This emphasis was facilitated by the fact that the cause originated in a bill brought by a white man against a negro for specific performance of a contract to purchase a residence for negro occupancy in a white block. In dealing with the contention that the ordinance would "promote the public peace by preventing race conflicts", the Court was content with the self-proving answer that "this aim cannot be accomplished by laws or ordinances which deny rights created or

[23] *Ibid.*

[24] *Ibid.*

[25] See cases cited, *supra,* footnotes 5, 8, 10, 14 and 16.

[26] The decision of the Court was unanimous, but the fact that it was not reached without difficulty may be inferred from the reporter's statement that the case was first argued in April, 1916, reargued in April, 1917, and not decided until November, 1917.

[27] The ordinance, by providing that nothing contained therein "shall affect the location of residences, places of abode or places of assembly made previous to its approval", (38 Sup. Ct., at p. 17), avoided the difficulty which induced the supreme court of Maryland to declare a Baltimore segregation ordinance invalid. State *v.* Gurry (1913) 121 Md. 534, 88 Atl. 546. The Louisville ordinance involved a restraint on alienation, and not on the continuance of present use. But interference with freedom to sell demands as much justification as interference with freedom to use. The proviso in the Louisville ordinance makes it less harsh on present occupants, but it does not save it from being an interference with rights acquired before its passage. Whether those rights were "vested rights" depends upon whether they can constitutionally be cut off by subsequent legislation, which is the issue in dispute.

protected by the federal Constitution". It would have been well to have elaborated the comment on the decisions in which race discriminations had been sustained. It is hardly enough to say that "such legislation must have its limitations".[28] Further argument might well have been adduced to sustain the position that the denial of equality of legal freedom occasioned by the ordinance under review was substantial and not formal merely, and that the possibility that the restriction might promote the public peace was too visionary and insignificant to justify so serious an interference with the legal equality of the races.

The decisions of the Supreme Court on various forms of race discrimination do not support the statement of Mr. Justice Harlan that the "Constitution is color-blind",[29] but they establish that the propriety of race separation is conditioned on giving to each race equality or something approaching equality of legal opportunity, even though they do not receive identical treatment. The Supreme Court's studies in chiaroscuro may not suit the taste of those who insist that the state must be allowed to discriminate between the races as it pleases, or not to discriminate at all. But to those who are aware that differences of degree affect all questions of the police power,[30] the Supreme Court will not seem guilty of inconsistency. Its decisions have shown leniency towards the sensibilities of the white race in the Southern states so long as those sensibilities found expression in laws imposing only ephemeral or intermittent separation of the races or in laws specifically aimed against miscegenation. But when steps are taken to impose continuous and permanent barriers to the freedom of the members of either race to settle their abode where they will and can, the Supreme Court has wisely refused to accept fictions of equality in the face of the obvious fact of inequality.

T. R. P.

ACCUMULATED CORPORATE EARNINGS AND THE INCOME TAX.—For a proper interpretation of the federal income tax laws, their constitutional setting must always be kept in mind. The Pollock case,[1] held that Congress was not authorized to levy a tax on income, whether derived from realty or from personalty, because such was, in effect, a direct tax on the property itself and, therefore, unconstitutional under Article 1, § 9 requiring direct taxes to be apportioned according to population. To obviate this difficulty, the Sixteenth Amendment was adopted February 25, 1913. Under the authority of this Amendment, the Federal Income Tax Law of 1913[2] was passed, taxing "income arising or accruing from all sources in the preceding calendar year", but for the year 1913 only that "accruing from March first". Corporations were made subject to the normal tax on much the same terms as individuals, and dividends from corporations were expressly included

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[28] 38 Sup. Ct., at p. 20.

[29] Plessy *v.* Ferguson, *supra,* footnote 5, at p. 559.

[30] *Cf.,* Holmes, *J.,* in Rideout *v.* Knox, *supra,* footnote 20, at p. 372: "It may be said that the difference is only one of degree; most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined."

[1] Pollock *v.* Farmers' Loan & Trust Co. (1895) 158 U. S. 601, 15 Sup. Ct. 912.

[2] 38 Stat. 166, c. 16.